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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-6718

ROY KIRK FRENCH, III,

Appellant,

vs.

THE HONORABLE A. EUGENE BLACKBURN,

Appellee.

****

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

****

JURISDICTIONAL STATEMENT

****

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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JURISDICTIONAL STATEMENT

****

The appellant appeals from the judgment of the United States District Court for the Middle District of North Carolina, Winston-Salem Division, upholding the constitutionality of North Carolina's involuntary commitment Statutes. Appellant does not appeal from that portion of the judgment upholding the constitutionality of N.C.G.S. §122-58.7(d).

OPINION BELOW

The opinion of the District Court is not yet reported. It is set out in the Appendix, infra, pp.23-44.

JURISDICTION

This action was brought by appellant to secure injunctive and declaratory relief against the enforcement of the North Carolina statutory scheme which authorizes the involuntary confinement in a mental institution of persons who are alleged to be, or in fact are, mentally ill and a danger to themselves or others. Plaintiff claimed that said procedure deprived him of

certain rights secured to him by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Jurisdiction was based on 28 U.S.C. §1343 and 42 U.S.C. §1983.

The judgment of the United States District Court for the Middle District of North Carolina sought to be reviewed here was entered on March 31, 1977. Notice of appeal from this judgment was filed on April 7, 1977, in the United States District Court for the Middle District of North Carolina; a copy of the Notice of Appeal is set out in the Appendix, infra, p.47.

The Court has jurisdiction of the appeal by virtue of 28 U.S.C. §1253. Cases believed to sustain the jurisdiction of the Court include Florida Lime and Avocoda Growers, Inc. v. Jacobson, 362 U.S. 73 (1960); Radio Corp. of America v. United States, 341 U. S. 412 (1950).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdictions the equal protection of the laws.

General Statutes of North Carolina:

Article 5A of Chapter 122 of the North Carolina General Statutes, N.C.G.S. §122-58.1 et seq. The pertinent text is set forth in the Appendix, infra, at pp.49-52.

QUESTIONS PRESENTED

1. Whether Article 5A of Chapter 122 of the North Carolina General Statutes is unconstitutional on its face under the due process clause for failure to require a probable cause hearing

within 48 hours of the initial commitment.

2. Whether the failure of N.C.G.S. §122-58.5 to require adequate written notice deprives Plaintiff of due process.

3. Whether Article 5A of Chapter 122 is, on its face, constitutionally invalid under the Fifth and Fourteenth Amendments for failure to require that individuals detained be informed of their right against self-incrimination.

4. Whether N.C.G.S. §122-58.8(b) is, on its face, constitutionally invalid under the due process clause for failure to require a standard of proof beyond a reasonable doubt.

5. Whether N.C.G.S. §122-58.7 deprives Plaintiff of equal protection of the law by failing to provide a right to trial by jury.

STATEMENT OF THE CASE

Proceeding under N.C.G.S. §122-58.3, the plaintiff's mother, on January 19, 1976, filed a sworn petition which provided the basis for finding by the assistant clerk of superior court that there were reasonable grounds to believe that the facts alleged in the petition were true and that the plaintiff was probably mentally ill or an inebriate and imminently dangerous to himself or others. French v. Blackburn, Slip Op., at p. 3. The assistant clerk then issued a custody order under N.C.G.S. §122-58.3(b) and a notice of the hearing for involuntary commitment under N.C.G.S. §122-58.5. Id. A copy of the notice is set forth in the Appendix, infra, at p.53.

Pursuant to N.C.G.S. §122-58.4, the plaintiff was, on the same date, taken into custody and transported to Reynolds Health Center, Winston-Salem, North Carolina, and there examined by a qualified physician who found him to be mentally ill or an inebriate and imminently dangerous to himself or others and who therefore recommended that he be hospitalized. The plaintiff was confined to the Community Health Center of Reynolds Memorial Hospital from

January 19, 1976, to the time of the hearing on January 28, 1976. The hearing resulted in the release of the plaintiff, it being found by the presiding judge that although the plaintiff may have been mentally ill or inebriate, that it had not been shown that he was imminently dangerous to himself or others. Id. Prior to that hearing, viz., January 26, 1976, Plaintiff's counsel filed a response to the petition for involuntary commitment which denied the material allegations therein and requested that Plaintiff be granted a trial by jury. March 16 Stipulations, No. 9.

Again proceeding under N.C.G.S. §122-58.3, the Plaintiff's father, on January 31, 1977, filed a sworn petition which provided the basis for a finding by the Magistrate that there were reasonable grounds to believe that the facts alleged in the petition were true and that the Plaintiff was probably mentally ill or an inebriate and imminently dangerous to himself or others. Answer to Second Supplemental Complaint. The Magistrate then issued a custody order under N.C.G.S.§122-58.3(b), and an assistant clerk of court thereafter issued and caused to be served upon Plaintiff a Notice of the hearing for involuntary commitment under N.C.G.S.§122-58.5. Id. A copy of the Notice is set forth in the Appendix, infra, at p. 54.

As with the previous commitment, Plaintiff was, pursuant to N.C.G.S. §122-58.4, taken into custody and transported to Reynolds Health Center, Winston-Salem, North Carolina, and again examined by a physician who found him to be mentally ill or inebriate and imminently dangerous to himself or others and who, therefore, recommended that he be hospitalized involuntarily. Id. The Plaintiff was confined to the Community Health Center of Reynolds Memorial Hospital from January 31, 1977, to the time of the hearing on February 9, 1977, at which time the presiding judge again determined that although the Plaintiff may have been mentally ill or inebriate, that it had not been shown that he was imminently

dangerous to himself or others. Id. Prior to that hearing, viz., January 26, 1976, Plaintiff's counsel filed a response to the petition for involuntary commitment, and requested that Plaintiff be granted a jury trial. Id. As with the 1976 hearing, no jury trial was provided.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

INTRODUCTION

This Court has already recognized in dictum that civil commitment involves a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972). Furthermore, commitment at the present time deprives a person of rights of privacy, association, and movement. Developments in the Law- Civil Commitment of the Mentally Ill, 87 Harv. Law Rev. 1190, 1201 (1974). Additionally, civil commitment to a hospital under the North Carolina procedure may subject an individual to the loss of the right to manage his own affairs, pursuant to N.C.G.S. §35-3, and loss of the right to operate a motor vehicle upon the highways of the state. N.C.G.S. §20-17.1. The manner, therefore, in which the state goes about confining one to a mental institution is, indeed, substantial.

At the outset it should be noted that the trial court's analysis of each of the questions here presented derived from its threshold "general opinion that the North Carolina General Assembly has enacted an excellent legislative scheme"[1/] and, therefore, "We perceive no reason to hold the statutory provisions unconstitutional." Slip Op., at p. 5.

In turn, the trial court's "general opinion" derived from its conclusion that there are two humanitarian purposes of the involuntary commitment proceedings:

> Fundamentally, the state is attempting to temporarily withdraw from society those persons whose mental state is such that their presence may pose a danger to society or to themselves. Secondly, the state is providing treatment to those individuals who may not otherwise have the wisdom or the wherewithal to seek it themselves.

1/ Plaintiff concedes that, at the time of its enactment, Article 5A of Chapter 122 was, relative to commitment procedures in other jurisdictions, a progressive scheme. Nevertheless, the trial court overlooked the serious defects hereinafter discussed.

Plaintiff submits that the trial court's "general opinion" regarding the North Carolina civil commitment procedure, insofar as it relies upon the alleged right of the state to provide treatment to non-dangerous individuals who refuse such treatment themselves, runs afoul of the teaching of this Court as enunciated in O'Conner v. Donaldson, 95 S. Ct. 2486 (1975). In O'Conner the Court held that "a State cannot constitutionally confine without mor non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." Id., 95 S. Ct. at 2494. Thus, the Court held unconstitutional the involuntary confinement of a person solely on the ground that he is mentally ill, and where he is dangerous to no one and can live safely in freedom. Although the Court declined to decide the precise question of whether it would, also, be unconstitutional for a state to confine a mentally ill person solely on the ground that he is in need of treatment, the Chief Justice expressed no doubts on the subject: "Nor can I accept the theory that a State may lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. Our concepts of due process would not tolerate such a 'trade-off'." Id., 95 S. Ct. at 2500.

A. THE FAILURE OF ARTICLE 5A OF CHAPTER 122 OF THE NORTH CAROLINA GENERAL STATUTES TO REQUIRE A PROBABLE CAUSE HEARING SUBSEQUENT TO INITIAL DETENTION RENDERS IT FACIALLY UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE TO THE FOURTEENTH AMENDMENT.

Although it cannot be seriously doubted that "the state may have a compelling interest in emergency detention [prior to a hearing] of persons who threaten violence to themselves or others for the purpose of protecting society and the individual," Lessard v. Schmidt, 349 F. Supp. 1078, 1091 (E.D.Wis. 1972),

vacated and remanded, 414 U.S. 473 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded, 421 U.S. 957 (1975), on remand, 413 F. Supp. 1318 (E.D. Wis. 1976), it likewise cannot be denied that "[t]he individual's interest in liberty is even more compelling than his interest in property rights." Id.at 1091, cf., e.g., Boddie v. Connecticut, 401 U.S. 371 (1971), and therefore "where a person said to be mentally ill and dangerous is involuntarily detained, he must be given a hearing within a reasonable time to test whether the detention is based upon probable cause to believe that confinement is necessary under constitutionally proper standards for commitment." Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (three-judge court). Accord, Lessard v. Schmidt, supra, 349 F. Supp. at 1091 ("....the maximum period [during] which a person may be detained without a preliminary hearing is 48 hours."); Staumus v. Leonhardt, 414 F. Supp. 439, 446 (S.D. Iowa 1976); Bell v. Wayne County General Hospital, 384 F. Supp. 1085, 1098 (E.D. Mich. 1974) (three-judge court). And the need for a probable cause hearing in civil commitment proceedings is more compelling than the need in criminal proceedings: "The importance of the interests involved in this situation are of the highest, in that the deprivation of liberty necessarily is one based on status and not on the alleged commission of an act deemed criminal by society. . ." Lessard v. Schmidt, supra, at 1091-1092.

In the instant case, as a result of the ex parte procedure held pursuant to N.C.G.S. §122-58.3(a), (b), plaintiff was hospitalized against his will from January 19, 1976 until January 28, 1976, and again from January 31, 1977 until February 9, 1977. Subsequent to these respective periods of detention the state trial court released plaintiff from custody after finding that he posed a danger neither to himself nor anyone else. Thus plaintiff was

subjected to "a significant deprivation of liberty," Lessard, supra, at 1091, which could have well been prevented had a probable cause hearing been held within 48 hours after the initial detention.

Nevertheless, the trial court concluded that a probable cause hearing is not constitutionally required inasmuch as the ten day period of confinement between original detention and the final hearing is not unreasonable. That conclusion, in turn, was premised upon two separate and distinct findings, at least one of which is unsupported by the record.

First, the court read N.C.G.S. §122-58.6(c) to mean that "[d]uring this time period [from original detention to final hearing] the respondent is receiving treatment....which may not only aid his mental health, but which also may be necessary to an adequate and informed hearing on the necessity of his commitment." Slip Op. at p. 7. Nothing in the record supports the proposition that plaintiff, or anyone else who has been so detained, actually receives any form of treatment during initial detention. N.C.G.S. §122-58.6(c) does no more than authorize the physician--who may or may not be a psychiatrist-- to administer reasonable medication and treatment. Assuming, however, that a respondent is provided with treatment during the pre-trial detention period, the trial court's reliance on the supposed beneficial effects of such treatment ignores the fact that many mental illnesses are untreatable, see, e.g., Livermore, "On the Justifications for Civil Commitment," 117 Pa. L. Rev. 75, 93 (1966), and that "unless constitutionally prescribed procedural due process requirements for involuntary commitments are met, no person should be subjected to 'treatment' against his will." Lessard, supra, 349 F. Supp. at 1087. And, as discussed earlier herein, the trial court's reliance on the supposed beneficial effects of treatment as a justification

for depriving one of his liberty ignores the admonition of the Chief Justice in his concurring opinion in O'Conner, supra, 95 S Ct. at 2500.

Secondly, the court justified the lack of a probable cause hearing by stating that the procedural safeguards afforded a respondent "gives the respondent at least two opportunities to be released prior to the hearing based upon medical examinations and the finding of the qualified examining physician." Slip. Op. at p. 8.

Whether an examination by two[2/] physicians prior to the hearing provides a meaningful opportunity for an individual, who is not mentally ill and dangerous, to secure his release is open to grave doubt, however, when one considers that, in Forsyth County alone, between July 1, 1974 and June 30, 1975, 543 petitions for involuntary commitment were filed. April 7 Stipulations, No. 1a. Of the 543 filed, only two were abated by the report of a physician, but 224 were dismissed by the judge at the final hearing on the merits. Id., 1b, 1c.

B. THE FAILURE OF N.C.G.S. §122-58.5 TO PROVIDE ADEQUATE WRITTEN NOTICE SUFFICIENTLY IN ADVANCE OF THE COMMITMENT HEARING DEPRIVES PLAINTIFF, AND OTHERS SIMILARLY SITUATED, OF DUE PROCESS OF LAW.

N.C.G.S. §122-58.5 states:

> Upon receipt of a qualified physician's finding....the clerk of superior court shall...calendar the matter for hearing, and notify the respondent and counsel of the time and place of the hearing. Notice must be given at least 48 hours in advance, unless waived by counsel for the respondent. [Emphasis added].

2/ Prior to plaintiff's hearing on January 28, 1976, he had been examined by only one physician.

In ruling upon plaintiff's challenge to the sufficiency of the notice required by §122-58.5, the trial court held that "when the legislature used the term 'notice' it means that notice as is required by due process and, therefore, [we] conclude that the statute is constitutional on its face." Slip Op. at p. 10. Although conceding that "[a]t first blush it would appear that it might be better to serve the respondent with a copy of the petition or affidavit forming the basis of his custody," the court nevertheless concluded that s·ch service was not constitutionally required" in light of the nature of the proceedings, the subject matter thereof, and the parties thereto," and inasmuch as "service of such might possibly cause more harm to such a respondent than nonservice." Id., p. 11.

In construing the word "notice" in §122-58.5 to mean all the notice that is required by the due process clause, the trial court ignored the plain wording of the statute which only requires the defendant to notify the respondent of "the time and place of the hearing." Based upon the holding of this Court In re Gault, 387 U.S. 1, 33 (1967), those courts which have considered the question of the sufficiency of notice required as a prelude to an involuntary commitment proceeding have held that notice of date, time, and place of the hearing is not satisfactory. Lessard v. Schmidt, supra, 349 F. Supp. 1078, 1092; Suzuki v. Quisenberry, 411 F. Supp. 1113, 1127 (D. Hawaii, 1976); Lynch v. Baxley, supra, 386 F. Supp. 378, 388; Bell v. Wayne County General Hospital, supra, 384 F. Supp. 1085, 1091-1092; Doremus v. Farrell, 407 F. Supp. 509, 515 (D. Nebraska 1975); State ex rel. Hawks v. Lazaro, 202 S. E. 2d 109, 124 (W. Va. 1974). As the court in Lessard stated, at 349 F. Supp. 1092:

> "Notice of the scheduled hearing, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded and it must set forth the basis for detention with particularity. [Citation deleted]. Notice of date, time and place is not satisfactory. The patient should be informed of the basis for his detention, his right to trial by jury, the standard upon which he may be detained, the names of examining physicians and all other persons who may testify in favor of his continued detention, and the substance of their proposed testimony." [Emphasis supplied.]

When measured against these standards, N.C.G.S. §122-58.5 must be found wanting in every respect. "Notice must be given" only "48 hours in advance, unless waived by counsel," and must set forth only the time and place of the hearing. The statute does not require that the notice "set forth the basis for detention with particularity" [3] or that the the respondent be informed of his right to trial by jury. Nor is the respondent given notice of: the standard upon which he may be detained (e.g., "clear and convincing" evidence or "proof beyond a reasonable doubt"); the names of examining physicians and all other persons who may testify in favor of his continued detention, and the substance of their proposed testimony. On the contrary, the respondent is informed only that "it has been alleged that you are a proper subject for involuntary commitment to a treatment facility pursuant to the laws of the State of North Carolina." Cf., In re Gault, supra, 387 U.S. at 31-33 (petition alleging in general terms that a child is "neglected, dependent or delinquent" held insufficient under the Due Process Clause).

Finally, the trial court's fear that service upon a respondent of even the petition or affidavit which forms the basis of his custody "might possibly cause more harm to such

[3] "Notice" is, in practice, provided by filling in the time and place of the hearing on a form notice provided by the State's Administrative Office of the Courts. In addition to time and place, the notice informs the respondent of his right to private or court appointed counsel and the possible consequences which may flow from the hearing.

a respondent than nonservice," Slip. Op., p. 11, n. 10, is not only unsupported by the record, but ignores the fact that

> [t]he fear of trauma presupposes that the individual is mentally ill, an issue that should remain open until the commitment proceedings are completed. Moreover, involuntary confinement in a mental institution would itself seem to be a traumatizing experience, and it is unlikely that notice would significantly increase that trauma. Indeed, service of legal papers which inform the individual that he will be accorded procedural protections may actually reduce the individual's anxiety.

Developments in the Law, supra, 87 Harv. L. Rev. at 1274.

> C. ARTICLE 5A, CHAPTER 122 OF THE NORTH CAROLINA GENERAL STATUTES IS, ON ITS FACE, CONSTITUTIONALLY INVALID UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT INASMUCH AS IT FAILS TO REQUIRE THAT INDIVIDUALS DETAINED BE INFORMED OF THEIR RIGHT AGAINST SELF INCRIMINATION.

Although the availability of the privilege [4/] against self incrimination involves conflicting considerations, see, Lessard v. Schmidt, supra, 349 F. Supp. at 1100-1101, the majority of those courts which have considered the question have held that "[t]he privilege....is fully applicable at all stages of the civil commitment process, including the psychiatric interviews." Lynch v. Baxley, 386 F. Supp. 378, 394 (M.D. Ala., 1974). Accord, Lessard v. Schmidt, supra; Suzuki v. Quisenberry, supra. And see, Millard vs. Harris, 406 F. 2d 964 (D.C. Cir. 1968). The court below, nevertheless, resolved the conflict by finding that "to apply the privilege to the type of proceedings here challenged would be to destroy the valid purposes which they serve as it would make them unworkable and ineffective." Slip Op. at p. 15. Cf., Suzuki v. Quisenberry, supra, 411 F. Supp. at 1131: "The resolution of the conflict is that if there is no other basis for depriving a person of his liberty than statements obtained from him for that purpose by an examining physician who has never seen him before, there should not be any order of commitment."

Furthermore, in resolving the "conflict" against the respondent in a civil commitment proceeding, the trial court erroneously relied upon the decision of the Fourth Circuit Court of Appeals in Tippett v. State of Maryland, 436 F. 2d 1153 (4th Cir. 1971). At issue there was the constitutionality of Maryland's Defective Delinquincy Act which, in essence, provides that persons convicted of specific offenses may be thereafter tried as defective delinquents and, if found to be such, may be confined for an indeterminate period. The Fourth Circuit concluded that the valid objectives of the Act would be frustrated by application of the privilege against self incrimination, especially since the purpose of the proceedings was not to determine guilt or innocence, but rather to provide treatment. In the instant case, however, the trial court overlooked the critical distinction between the alleged defective delinquent in Maryland, and the alleged mentally ill in North Carolina: At stake in the later case is the individual liberty of the respondent; in Maryland, the alleged defective delinquent has already been deprived of his liberty.[5/] See, Sas v. State of Maryland, 334 F. 2d 506, 511 (4th Cir. 1964): "This

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[4/] "We must be clear about what the claim of the privilege against self incrimination means in this context. It means that the state may not commit an individual on the basis (in whole or in part) of his statements to examining psychiatrists (or others) in the absence of a showing that the statements were made voluntarily after the individual was informed of and understood the purpose of the examination and that he was not obliged to speak. It does not mean that psychiatrists cannot talk to a patient for purposes of treatment. It does not mean that evidence cannot be adduced as to the patient's statements in a non-inquisitorial setting." Suzuki v. Quisenberry, supra, at pp. 1131-1132.

[5/] Cf., In re Gault, supra, 387 U.S. 1, 49-50:

> "[C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.' And our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty-- a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankinds battle for freedom." [Emphasis added].

request [for a hearing under the Defective Delinquency Act] may only be made if the convict has been sentenced to or is then serving a criminal sentence in a penal institution."

Finally, as heretofore discussed, the mere fact that commitment under Article 5A of Chapter 122, N.C.G.S., may result in treatment for the respondent does not, in and of itself, justify forcing the respondent to forego his 5th Amendment right. Cf., O'Conner v. Donaldson, supra, 95 S. Ct. at 2500 (concurring opinion of Chief Justice Burger).

D. BY FAILING TO REQUIRE A STANDARD OF PROOF BEYOND A REASONABLE DOUBT, BASED AT A MINIMUM ON A RECENT ACT, ATTEMPT OR THREAT TO DO SUBSTANTIAL HARM TO ONESELF OR OTHERS, N.C.G.S. §122-58.8(b) DEPRIVES PLAINTIFF AND OTHERS SIMILARLY SITUATED OF DUE PROCESS.

Based upon the fundamental proposition that because "stigmatization and loss of liberty attendant upon forced confinement are of the most profound consequence to the individual affected, due process demands that he be subjected to such disabilities only if the necessity for his commitment is proved by evidence having the highest degree of certitude reasonably attainable in view of the matter at issue, "Lynch v. Baxley, 386 F. Supp. 378, 393 (M. D. Ala. 1974), those courts which have been faced with the issue of the quantum of proof required in involuntary commitment proceedings have uniformly and unequivocally held the "preponderence of the evidence" standard totally inadequate under the Due Process clause of the Fourteenth Amendment. Those same courts have split, however, when faced with the issue of whether due process requires only proof of a "clear and convincing" 6/nature, see, e.g., Lynch v. Baxley, supra; Stamus v. Leonhardt, 414 F. Supp. 439, 449 (S.D. Iowa 1976); Bartley v. Kremens, 402 F. Supp. 1039, 1051-1053, (E. D. Pa. 1975), or "proof beyond a reasonable doubt," see, e.g., In re Ballay, 482 F. 2d 648, 649-650 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078, 1095 (E.D. Wisconsin 1972); United States Ex Rel. Stachulok v. Coughlin, 520 F. 2d 931, 935-937 (7th Cir. 1975);

6/ N.C.G.S. §122-58.8(b) phrases the standard as "clear, cogent, and convincing evidence."

Suzuki v. Quisenberry, 411 F. Supp. 1113, 1132 (D. Hawaii 1976). For the reasons set forth below, plaintiff submits that the trial court erred in holding "that in light of the precedent in the Fourth Circuit and in light of the nature of the involuntary commitment preoceedings. . ., the legislature's choice of the standard of proof does not offend due process." Slip Op. at p.17.

The "Patuxent" line of cases decided by the Fourth Circuit, e.g., Tippett v. Maryland, supra; Dower v. Boslow, 539 F. 2d 969 (4th Cir. 1976), and cited by the trial court as controlling in the instant case, are inapplicable inasmuch as the proceedings there at issue do not involve a deprivation of liberty.7/ See, Sas v. State of Maryland, supra, 334 F. 2d at 511. Cf., In re Winship, 397 U.S. 558 (1970). Furthermore, the Defendant in a proceeding under Maryland's Defective Delinquency Act, unlike the Plaintiff herein, is entitled to a trial by jury and an independent psychiatrist of his own choosing who must be furnished by the state. Sas, p. 515. The availability of these procedural safeguards, absent in the case at bar, led the Fourth Circuit to conclude that

7/ In Tippett, the court held that the burden of persuasion by a preponderance of the evidencing in a proceeding for commitment pursuant to the Maryland Defective Delinquent Act did not offend due process. Plaintiff submits that Tippett is not only not dispositive of the instant issue, but sheds little or no light upon it. First, Tippett was decided prior to the parallel line of cases cited above, e.g., Lynch v. Baxley, Lessard v. Schmidt. Second, the Tippett court qualified its own decision as follows: "We do not suggest that our disposition of these cases should be taken as a final and unalterable evaluation of all constitutional questions which may arise out of the Act's administration. We would not consider ourselves bound by today's decision in a future case if later experience should show serious unfairness in the administration of the Act." 436 F. 2d 1158, n. 18. Finally, writ of certiorari in Tippett was dismissed sub nom. as improvidently granted, Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972), but only after a finding that "the statutes governing civil commitment in Maryland are presently undergoing substantial revision, designed to provide greater substantive and procedural safeguards to committed persons. Accordingly, it seems a particularly inopportune time for this court to consider a comprehensive challenge to the Defective Delinquency Law." Id. at 358.

proof beyond a reasonable doubt was not required in defective delinquency proceedings:

> We are unable to conclude that a person is afforded less protection by a judicial procedure which requires proof by a preponderance of the evidence, which also grants the important right of jury trial, than he is given by an administrative procedure before a single hearing officer, even though the state is required there to prove the issue by clear and convincing evidence. We are inclined to think it may be greater... The right to a jury trial will more than counterbalance a difference in standard of proof.

Dower v. Boslow, supra, 539 F. 2d at 972 [emphasis added].

In reliance upon the holding in Winship, supra, the court in Lessard v. Schmidt, supra, stated:

> "The argument for a stringent standard of proof is more compelling in the case of a civil commitment in which an individual will be deprived of basic civil rights and be certainly stigmatized by the lack of confidentiality of the adjudication. We therefore hold that the state must prove beyond a reasonable doubt all facts necessary to show that an individual is mentally ill and dangerous."

349 F. Supp. at 1095. The analogy to the criminal process was likewise at the foundation of the holding in In re Ballay, supra:

> The first and dominant objective [of involuntary commitment statutes] involves society's concern with antisocial conduct. This leads inexorably to analogy with the criminal system . . .On virtually every plane of comparison the civil model presents an equally compelling plea for a stringent burden of proof . . .The evidence which serves as a prerequisite to hospitalization remains uncertain, particularly with respect to predictions of dangerousness, and the ultimate decision may therefore unduly reflect clinical, rather than the appropriate legal and community, considerations.

482 F. 2d at 650. And see, Suzuki v. Quisenberry, supra, 411 F. Supp. at 1132 ("I find the reasoning of In re Ballay most persuasive and adopt that court's conclusion that the standard of proof in nonconsenual civil commitment proceedings must be beyond a reasonable doubt").

And inasmuch as"[i]ncarceration for [the] mere propensity [of being dangerous to oneself or others] is punishment not for acts, but for status," 8/ then the state must prove its case beyond a reasonable doubt "based on a record that clearly document[s] a high probability of serious harm." Cross v. Harris, 418 F. 2d 1095, 1102 (D.C.Cir. 1969). And while "attempts to predict future conduct are always difficult..., civil confinement can be justified in some cases if the proper burden of proof is satisfied and dangerousness is based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another." Lessard v. Schmidt, supra, 349 F. Supp. at 1093 (emphasis supplied). 9/ And see, Livermore, On the Justification for Civil Commitment, 117 Pa. L. Rev. 75, 94 "Case 8" (1968).

E. THE FAILURE OF N.C.G.S. §122-58.7 TO PROVIDE FOR RIGHT TO TRIAL BY JURY RENDERS SAID STATUTE UNCONSTITUTIONAL ON ITS FACE INASMUCH AS IT DEPRIVES PLAINTIFF, AND OTHERS SIMILARLY SITUATED, OF THEIR RIGHT TO EQUAL PROTECTION OF THE LAW.

The essence of plaintiff's equal protection claim is twofold: first, the failure of the state to provide a jury trial in involuntary commitment proceedings (N.C.G.S. §122-58.7), while guaranteeing a trial by jury in lunacy inquisitions (N.C.G.S. §35-2, a copy of which is set out in the Appendix, infra, at p.55), creates a disparate classification which discriminates against those persons proceded against by the former and which is not justified by any compelling 10/ state interest. Second, the respondent in an

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8/ Cf., Robinson v. California, 370 U.S. 660, 666 (1962).

9/ N.C.G.S. §122-58.6, the forerunner to N.C.G.S.§§122-58.7 and 58.8, provided that "a district court judge shall hear the case to determine, by reason of the commission of overt acts, whether the person is violent and of imminent danger to himself or others, or is gravely disabled." [Emphasis added.] N.C.G.S. §§122-58.7 and 8 omitted any reference to "overt acts."

10/ Plaintiff submits that the right involved is a fundamental

involuntary commitment hearing---who may be subjected to a massive deprivation of liberty--has no right to a jury trial, but the defendant in any state criminal prosecution has such a right, N.C. Constitution, Art. I, §24, as does the plaintiff or defendant in any civil proceeding "respecting property." Id., Art. I, §25.

Prior to its most recent amendment, the North Carolina involuntary commitment procedure set forth in Article 5A of Chapter 122 provided for trial by jury:

> "The order of the district court judge may be appealed to the superior court for a hearing de novo. The person at such hearing shall retain the right to a jury determination of the issues..."

N.C.G.S. §122-58.6(g). That right was eliminated by the enactment of N.C.G.S. §122-58.9 which provides that the "judgment of the district court is final" and that the sole mode of appeal is one on the record to the North Carolina Court of Appeals.

Thus a person proceeded against pursuant to Article 5A of Chapter 122 may initially be deprived of his liberty for a period not in excess of three months, N.C.G.S. §122-58.8(b), and thereafter for unlimited successive periods of 180 and 365 days respectively, N.C.G.S. §122-58.11(d), (e), without the benefit of trial by jury. And, pursuant to the provisions of N.C.G.S. §122-55 [11] and

(cont.) one and that the state must therefore meet the more stringent "compelling state interest test" to justify the disparate classification. This is so because where "massive curtailment of liberty" is involved, "the jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment." Humphrey v. Cady, 405 U.S. 504, 509 (1972) (emphasis added). Cf., Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("....trial by jury in criminal cases is fundamental to the American scheme of justice"): Giacco v. Pennsylvania, 382 U.S. 399, 402 (1966) ("Both liberty and property are specifically protected by the Fourteenth Amendment. . . and this protection is not to be avoided by the simple lable [civil or criminal] a State choosed to fasten upon its conduct or its statute"). But see, McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[11] §122-55. Hospitalization and incompetency proceedings to have no effect on one another-- Except for the provisions of G. S. 35-3, the hospitalization of an alleged mentally ill person or an alleged inebriate or an alleged mentally retarded person under the provisions of this Chapter shall in no way affect incompetency proceedings as set forth in Chapter 35 of the General Statutes of North Carolina, and incompetency proceedings as set forth in Chapter 35 shall have no effect upon hospitalization proceedings as set forth in this Chapter.

35-3, [12] a person so committed may also be deprived of the right to manage his own affairs, again without the benefit of trial by jury.

In contrast, in a proceeding pursuant to N.C.G.S. §35-2 ("inquisition of lunacy; appointment of guardian"), where no massive deprivation of liberty is at issue, but only the right to manage one's own affairs, the state does not provide an opportunity for trial by jury-- it absolutely requires it. And in the event either the petitioner or respondent appeals from the finding of the jury, the respondent is guaranteed a second trial by jury in a de novo hearing in superior court.

The anomaly thus presented, i.e., that an individual who contests the allegation of mental illness in an incompetency proceeding (where an unfavorable judgment results in no more than the appointment of a guardian) is entitled to two jury trials on the issue, but the individual who contests the allegation that he is mentally ill and a danger to himself or others in a commitment proceeding (where an unfavorable judgment may result not only in massive loss of liberty, but also the appointment of a guardian to manage one's affairs) has no right to trial by jury, raises classic and substantial questions of euqal protection. See, Baxstrom v. Herold, 383 U.S. 107, (1966); Humphrey v. Cady, 405 U. S. 504 , (1972); Lynch v. Baxley, 386 F. Supp. 378, 395 (M. D. Ala. 1974);

[12] §35-3. Guardian appointed on certificate from hospital for insane or training school.-- If any person is confined in any State, territorial or governmental asylum or hospital for the insane in this State or State training school or in any other state or territory, or in the District of Columbia, or in any hospital licensed and supervised by the State of North Carolina, the certificate of the superintendent of such hospital or training school declaring such person to be of insane mind and memory or mentally retarded, which certificate shall be sworn to and subscribed before the clerk of the superior court or any notary public, or the clerk of any court of record in the county, in which such hospital or training school is situated and certified under the seal of court, shall be sufficient evidence to authorize the Clerk to appoint a guardian for such idiot, lunatic or insane person...."

Gomez v. Miller, 337 F. Supp. 386, 391 (S.D. N.Y. 1971). Cf., Jackson v. Indiana, 406 U.S. 715 (1972). Nevertheless, the Court below found no equal protection violation inasmuch as it concluded: (1) that persons proceeded against pursuant to N.C.G.S. §35-2 and §122-58.7 respectively are not "similarly situated," Slip Op. at p. 20; (2) that a determination of "whether a person is mentally ill or an inebriate and dangerous to himself or others" may have reasonably been thought by the legislature "to be beyond the competency of a jury." Id. at 21.

In concluding that the respondent in a lunacy inquisition (§35-2) and the respondent in an involuntary commitment hearing (§122-58.7) are not similarly situated, the trial court correctly observed that at least one purpose of each proceeding is the determination of whether the respondent is mentally ill and/or inebriate. However, the court further concluded that it is at that point that the similarity ends inasmuch as the purpose of the lunacy inquisition is the appointment of a guardian, whereas the purpose of the commitment proceeding is involuntary commitment to a hospital. Slip Op. at p. 21. In essence then, plaintiff submits, the trial court's conclusion that the two classes of persons are not similarly situated 13/ is based on a distinction between the mentally ill, and the mentally ill who are dangerous to themselves or others. Cf., Baxstrom v. Herold, supra, 383 U.S. at 111-112: "Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the types of custodial or medical care to be given, but it has no

13/ The trial court's opinion does not deal with the question of whether plaintiff is denied equal protection when the State denies a jury trial in a civil commitment hearing, but constitutionally guarantees it in all civil actions "respecting property."

relevance whatsoever in the context of the opportunity to show whether a person is mentally ill at all." And see, Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972). In Murel, although the purposes and objectives of Maryland's defective delinquency law are different than the purposes and objectives of an involuntary civil commitment, this court nevertheless held that challenges to the defective delinquency law "should be considered in relation to the criteria, procedures, and treatment that the State of Maryland makes available to other persons, not 'defective delinquents,' commited for....treatment." Id. at 357-358.

Finally, it is no answer to allege that a jury determination is uniquely inappropriate or unnecessary in a civil commitment proceeding, but is necessary in an incompetency proceeding, inasmuch as North Carolina, like most other states,

> "conditions. . .confinement not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty. In making this determination, the jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment."

Humphrey v. Cady, supra, 405 U.S. at 509 [emphasis added].

In short, for purposes of granting judicial review before a jury on the question of an individual's mental illness vel non, the State has no rational basis, much less a compelling interest, in granting a jury trial where only the management of property is at stake, but withholding it where massive curtailment of liberty is involved.

CONCLUSION

For the reasons set forth above, and because the decision of the trial court is in conflict with the majority of decisions in the other federal courts which have addressed the identical issues, jurisdiction should be noted.

Respectfully submitted,

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FILED
MAR 31 1977
Clerk, U. S. District Court
Greensboro, N. C.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WINSTON-SALEM DIVISION

ROY KIRK FRENCH, III, on behalf of himself and all other persons similarly situated,	:	
Plaintiff	:	
v.	:	
THE HONORABLE A. EUGENE BLACKBURN, Clerk of Court for the Twenty-First Judicial District of the State of North Carolina, as representative of a class of defendants similarly situated,	:	C-76-52-WS
Defendant	:	

I concur.
J. Braxton Craven, Jr.
U.S.D.J.

I concur
Eugene A. Gordon
U.S.D.J.

THREE-JUDGE COURT

Heard February 24, 1977 Decided March 31, 1977

Before CRAVEN, Circuit Judge, GORDON, Chief District Judge, and WARD, District Judge

Legal Aid Society of Forsyth County, Winston-Salem, North Carolina, by Bertram Ervin Brown, II, (Gerald C. Kell on brief) for the Plaintiff; Isaac T. Avery, III, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for the Defendant; North Carolina Civil Liberties Union Legal Foundation, Inc., by Norman B. Smith, Greensboro, North Carolina, and Barry Nakell, Chapel Hill, North Carolina, as Amicus Curiae.

APPENDIX "A"

OPINION OF THE COURT

WARD, District Judge

This is an action for declaratory and injunctive relief to declare unconstitutional and to permanently enjoin the enforcement of the North Carolina involuntary commitment procedure set forth in Article 5A of Chapter 122 of the North Carolina General Statutes. Since the complaint draws into question the constitutionality of a state statute, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2284. The facts, having been established by the pleadings and stipulations, are without material dispute, and the parties have filed cross motions for summary judgment under Rule 56, Federal Rules of Civil Procedure.

The plaintiff, Roy Kirk French, III, has been subjected to the proceedings under the statute on two separate occasions. The defendant, A. Eugene Blackburn, is sued in his official capacity as the Clerk of Superior Court for the Twenty-First Judicial District of North Carolina.[1]

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[1] The plaintiff seeks to prosecute this action on behalf of himself and others similarly situated and against a class of defendants composed of all of the Clerks of Superior Court in North Carolina pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. This action is an attack on a statute of state-wide application and the relief, if granted, would by its very nature apply to all persons similarly situated with the named parties to this action. If the statutes in question are held unconstitutional, we have no reason to believe that the appropriate North Carolina authorities would do anything else but follow the decisions of this Court. We, therefore, perceive no reason to certify this action as a class action under Rule 23(c) of the Federal Rules of Civil Procedure. Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972); cf. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975). See also United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida, 493 F.2d 799 (5th Cir. 1974); Hatfield v. Williams, 64 F.R.D. 71 (N.D. Iowa 1974).

Proceeding under N.C.G.S. § 122-58.3, the plaintiff's mother, on January 19, 1976, filed a sworn petition which provided the basis for a finding by the assistant clerk of superior court that there were reasonable grounds to believe that the facts alleged in the petition were true and that the plaintiff was probably mentally ill or an inebriate and imminently dangerous to himself or others. The assistant clerk then issued a custody order under N.C.G.S. § 122-58.3(b) and a notice of the hearing for involuntary commitment under N.C.G.S. § 122-58.5.

Pursuant to N.C.G.S. § 122-58.4, the plaintiff was, on the same date, taken into custody and transported to Reynolds Health Center, Winston-Salem, North Carolina, and there examined by a qualified physician who found him to be mentally ill or an inebriate and imminently dangerous to himself or others and who therefore recommended that he be hospitalized. The plaintiff was confined to the Community Health Center of Reynolds Memorial Hospital from January 19, 1976, to the time of the hearing on January 28, 1976. The hearing resulted in the release of the plaintiff, it being found by the presiding judge that although the plaintiff may have been mentally ill or inebriate, that it had not been shown that he was imminently dangerous to himself or others.[2]

The foregoing procedures resulted in this sweeping attack

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[2] By a second supplemental complaint, the plaintiff indicates that he was again subjected to confinement in a mental health facility, based on a petition by his father, from January 31, 1977, until the date of another hearing on February 9, 1977.

on the North Carolina involuntary commitment procedures.[3] The plaintiff contends that the procedures violate the due process clauses of the fifth and fourteenth amendments due to: (1) the failure to provide a probable cause hearing within 48 hours of the initial custody of a respondent in the involuntary commitment proceedings; (2) the type of notice of the hearing which is given to a respondent; (3) the ability of counsel to waive, with the court's consent, the presence of the respondent at the hearing; (4) the failure to require that the respondent be advised of his right against self-incrimination; and (5) the failure to provide for proof beyond a reasonable doubt based upon a recent overt act, threat, or attempt. The plaintiff further argues that his right to equal protection of the laws has been denied since he is not entitled to a jury trial whereas such is available to those persons subjected to lunacy proceedings under N.C.G.S. § 35-2.[4]

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[3] The defendant argues that this case is moot since the plaintiff is not confined, the hearings for his commitment having been terminated in his favor. We find that the case is not moot as the issues may be said to be "capable of repetition yet evading review." Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). The facts here satisfy the recently articulated two-pronged test of Weinstein v. Bradford, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975), as (1) the issues presented here cannot be fully litigated prior to the cessation of the involuntary commitment proceedings at the statutory hearing since that hearing is generally held nine days after custody is obtained and (2) due to the plaintiff's history, there is a reasonable expectation that he would be subjected to the same action again, as is demonstrated by the plaintiff's second supplemental complaint. See note 2, supra.

[4] By stipulation, the plaintiff dismissed his allegation that the failure to provide a jury trial in involuntary commitment violates the due process clause of the fifth and fourteenth amendments.

We find that this broadside attack on the North Carolina statutory procedures for involuntary commitment is without merit and will, therefore, grant the defendant's motion for summary judgment.[5]

The Court is of the general opinion that the North Carolina General Assembly has enacted an excellent legislative scheme which adequately protects the interests of all who may be involved in an involuntary commitment proceeding. We perceive no reason to hold the statutory provisions unconstitutional. There is no doubt that the liberty interest of a person subjected to such proceedings is great and is an interest which has long been protected and to which the state and this Court are obligated to give great deference. However, we are presented with the concept of "fundamental fairness." It is the opinion of this Court that that concept is fully realized by the statutory procedure involved. There are two humanitarian purposes of the involuntary commitment

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[5] The defendant has urged this Court to abstain. We decline to do so. Unlike the situations in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), and Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973), federal interference with the state judicial process is not present. There is no commitment proceeding pending in state court against this plaintiff and considerations of equity and comity are absent. We likewise find the abstention doctrine of Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), inapplicable as it is firmly established that abstention is not proper where the statute in question is not susceptible to two interpretations. Where the statute which is attacked is clear and unambiguous on its face and is attacked as unconstitutional on its face, abstention is improper. Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963).

proceedings. Fundamentally, the state is attempting to temporarily withdraw from society those persons whose mental state is such that their presence may pose a danger to society or to themselves. Secondly, the state is providing treatment to those individuals who may not otherwise have the wisdom or the wherewithal to seek it themselves. We are, therefore, examining a hybrid proceeding which although involves a deprivation of liberty, the very purpose of that deprivation is not solely to protect society but also has as a purpose the protection, treatment, and aid of an individual who cannot or will not protect himself.[6] We find that in balancing these interests, the North Carolina statutes for involuntary commitment strike a fair and equitable balance and do not offend the constitutional standards of due process of the law.

I. Probable Cause Hearing

The plaintiff asserts that a probable cause hearing should be held within forty-eight hours after the respondent in an involuntary commitment proceeding is taken into custody to be examined by a qualified physician. The statutory procedure of N.C.G.S. § 122-58.7 currently provides only for a final hearing on commitment within ten days after his custody unless the respondent is given a continuance which may be for up to five days at a time.

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[6] Although the respondent is taken into "custody," the "confinement" is only in a place where examination and treatment are available. Under N.C.G.S. § 122-58.4(a), it is specifically provided that detention shall not be in a jail or other penal facility. Pursuant to N.C.G.S. § 122-58.6(c) when the respondent is awaiting the district court hearing, medication and treatment are authorized.

Every court which has addressed this issue has held that due process demands that some sort of a hearing be held within a reasonable time after confinement or custody. These same courts vary as to the time in which such a hearing must take place.[7] The issue before this Court should not be phrased, nor should it be resolved, in terms of required days, hours, or minutes, but should rather turn on the basis of the interests involved and fundamental fairness. The due process clause does not deal in magic numbers, but fundamental fairness.

We are of the opinion that the provision of N.C.G.S. § 122-58.7 which calls for a hearing within ten days of the respondent's custody is not unconstitutional. During this time period the respondent is receiving treatment, Id., § 122-58.6, which may not only aid his mental health, but which also may be necessary to an adequate and informed hearing on the necessity of his commitment. The nature of the confinement itself is limited to the humanitarian purposes of the proceedings as by the very terms of the statute, custody may not be accomplished in a jail or other penal facility but in an institution where treatment and medication are available. Id., § 122-58.4(a). The ten-day period appears even more

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[7] In re Barnard, 455 F.2d 1370 (D.C. Cir. 1971)(7 days); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975)(5 days); Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), prob. juris. noted, ___U.S.___, ___S.Ct.___, 47 L.Ed.2d 731 (1975) (72 hours); Bell v. Wayne County General Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974)(5 days); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974)(7 days); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded, 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded, 421 U.S. 957, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975), on remand, 413 F. Supp. 1318 (E.D. Wis. 1976)(48 hours).

reasonable in light of the additional procedural safeguards afforded a respondent, which, among other things, gives the respondent at least two opportunities to be released prior to the hearing based upon medical examinations and the findings of the qualified examining physician.[8] In light of the fact that the inquiry throughout the proceedings is aimed at the respondent's mental health, this Court is very reluctant to substitute another judgment in lieu of the legislature's deference to qualified medical opinion at these initial stages of the involuntary commitment proceedings.

In addition to these considerations, the Court is very much persuaded by the reasoning of Coll v. Hyland, 411 F. Supp. 905 (D.N.J. 1976), which held that a hearing within twenty days was constitutionally permissible. The Coll opinion in turn relies heavily on Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), aff'd sub nom., Briggs v. Arafeh, 411 U.S. 911, 93 S.Ct.

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[8] The custody order itself cannot be issued until the clerk or magistrate finds that there are "reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill or inebriate and imminently dangerous to himself or others . . . ." N.C.G.S. § 122-58.3(b). Within forty-eight hours, the respondent is then taken to a qualified physician who must, within another twenty-four hours, examine the respondent. Id. §§ 122-58.4(a), (c). The statute then provides that if the physician finds the respondent not mentally ill or inebriate or not imminently dangerous to himself or others, he shall be released and the proceedings terminated. Id. § 122-58.4(c). If the physician finds to the contrary, then the respondent is taken to a mental facility for treatment, observation, and further examination. Id. §§ 122-58.4(c), -58.6. Within another twenty-four hours, the respondent is there examined by a qualified physician who will release him pending the hearing if it is found that he is not mentally ill or inebriate or is not imminently dangerous to himself or others. Id. § 122-58.6(a). Therefore, within a time period of ninety-six hours after having been taken into custody, the respondent is examined by two qualified physicians either of which examinations may result in his release.

1556, 36 L.Ed.2d 304 (1973), in which a three-judge court ruled that confinement on the basis of a physician's findings for a period of forty-five days pending a hearing was not unreasonably long and did not constitute a denial of due process. This opinion was summarily affirmed by the Supreme Court and is, therefore, binding precedent under Hicks v. Miranda, 422 U.S. 322. 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). Since the Supreme Court has found that a forty-five day confinement pending a hearing is not unreasonable, we find that the North Carolina ten-day custody period prior to a full adversary hearing does not constitute a denial of due process.

II. Notice

N.C.G.S. § 122-58.5 states:

> Upon receipt of a qualified physician's finding . . . the clerk of superior court shall . . . calendar the matter for hearing, and notify the respondent and counsel of the time and place of the hearing. Notice must be given at least 48 hours in advance, unless waived by counsel for the respondent.

Plaintiff contends that the notice provision is constitutionally deficient in that it does not indicate a basis of the detention, does not set forth the standard of proof required at the hearing, does not inform him of a right to a jury trial, and does not indicate the names of the witnesses and/or physicians who will testify at the hearing in favor of commitment and the substance of their testimony. We find these assertions to be of little merit.

Due process requires that the notice of a hearing be appropriate to the occasion and reasonably calculated to inform the person to whom it is directed of the nature of the

proceedings. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The concept of due process is not a static one and it does not mandate particular forms of procedure. See, e.g., Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). As stated by the Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314, 70 S.Ct. at ____, 94 L.Ed. at 873:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. [Citations omitted] The notice must be of such nature as reasonably to convey the required information, [citation omitted], and it must afford a reasonable time for those interested to make their appearance, [citations omitted]. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

The statute here in question uses the terms "notify" and "notice." There can be little doubt that these terms were used to carry the full panoply of due process notice mandated by the law of the land. We hold that when the legislature used the term "notice" it means that notice as is required by due process and, therefore, conclude that the statute is constitutional on its face.

The notice form used by the defendant to inform the plaintiff of the proceedings against him is entirely adequate. It stated not only the time and place of the hearing but also notified him: (1) of the purpose of the hearing; (2) the right to counsel; (3) that he would be given the opportunity to present evidence at the hearing; and (4) that the presiding judge would then determine whether he should be released, be

committed for up to ninety days, or undergo outpatient treatment.

In light of the nature of the proceedings, we find that this procedure is reasonably calculated to inform the respondent in an involuntary commitment proceeding of the nature and purpose of the hearing and, therefore, is not constitutionally infirm. We can find no constitutional mandate to notify the respondent of the burden of proof or to serve upon him a list of witnesses and the substance of their proposed testimony. Such is not even required in a criminal proceeding. See Weatherford v. Bursey, ___U.S.___, 45 U.S.L.W. 4155 (No. 75-1510, Feb. 22, 1977). Since there is no right to a jury trial in such proceedings,[9] the state is not required to give notice of such. The notice itself states that the basis of the detention is due to the fact that it is alleged that he is a proper subject for commitment.[10]

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[9] See the discussion of the plaintiff's equal protection claim, infra.

[10] At first blush it would appear that it might be better to serve the respondent with a copy of the petition or affidavit forming the basis of his custody. This would parallel the service of a copy of the complaint in a traditional civil action and a copy of the indictment or information in a criminal proceeding. However, this Court does not say that such is constitutionally mandated here in light of the nature of the proceedings, the subject matter thereof, and the parties thereto. As was the case here, the petitions may have been filed by members of the respondent's family and service of such might possibly cause more harm to such a respondent than nonservice. The fact that such is not served does not, in this Court's opinion, violate the concept of fundamental fairness.

It is also onstitutionally mandated that the notice be given sufficiently in advance of the proceedings to provide a reasonable opportunity to prepare. The statute states that at the minimum the notice should be served at least 48 hours in advance of the hearing.[11] We find this time period constitutionally adequate to allow for sufficient preparation, especially in light of the fact that continuances may be granted, N.C.G.S. § 122-58.7(a), which will prevent any prejudice because of insufficient time to prepare.

We, therefore, conclude that the notice provision of N.C.G.S. § 122-58.5 is constitutionally sufficient on its face and as applied in the case before us.

III. Waiver of the Presence of Respondent at the Hearing

N.C.G.S. § 122-58.7(d) provides that: "With the consent of the court, counsel may in writing waive the presence of the respondent." Plaintiff has asserted that the waiver provision violates due process, stating that respondents have an "unwaiverable" right to be present.[12]

All courts which have addressed this issue have held that the presence of one subjected to an involuntary commitment

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[11] On both occasions when the plaintiff was subjected to the procedure he was given notice some nine days prior to the date of the hearing, as it was given on the same day that he was taken into custody.

[12] The right to be present at the hearing cannot be said to be "unwaiverable" as even in criminal proceedings one's right to confrontation can be waived by conduct, Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), or by consent such as through absence, Taylor v. United States, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973). There is no doubt, therefore, that the right to be present can be waived; the real issue is whether the North Carolina waiver provisions are sufficient to comport with due process.

hearing could be waived or excluded. See, e.g., Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), prob. juris. noted, ___U.S.___, ___S.Ct.___, 47 L.Ed.2d 731 (1975); Bell v. Wayne County General Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976).

The plaintiff, relying in part on the above-cited authority, asserts that the statute violates due process since there are no explicit standards for waiver set forth therein. We cannot agree with this conclusion as it assumes that a lawyer will not act in the best interests of his client. In light of the very nature of the lawyer-client relationship and in light of the ethical obligation of the lawyer to act for his client's best interests,[13] we cannot adopt the premise that a lawyer would waive his client's presence other than when it would be to the client's own benefit due to his mental or physical condition or for some other valid reason. Nor can we assume that a court would consent to such a waiver without some legitimate reason being presented to it. To assume otherwise would be to suggest that the court and the advocate somehow conspire to deprive the respondent of his constitutional rights in violation of the very ethics and responsibilities of their respective positions.

The plaintiff quotes the following passage from Suzuki v. Quisenberry, 411 F. Supp. 1113, 1130 (D. Hawaii 1976):

> While a committing court may exclude a respondent where his presence makes it impossible to

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[13] See Canon 7 of the Code of Professional Responsibility of the North Carolina State Bar printed as Appendix VII of the North Carolina General Statutes.

> conduct the hearing in a reasonable manner, the court may not decide in advance of hearing and based solely on the certificates of physicians that the respondent shall not be allowed to appear. Some method alternative to total exclusion must be attempted first, such as conducting the proceedings at a psychiatric facility.

The North Carolina statute provides for waiver not on the basis of physicians, but upon a written statement by counsel and with the consent of the court. We find this to be a critical difference. In addition the North Carolina statutory scheme is by its nature informal and closed to the public. N.C.G.S. § 122-58.7(g). In direct relation to the very nature of these statutory proceedings and directly bearing on the issue here presented, the legislature has already considered a reasonable alternative to total exclusion as it has provided in N.C.G.S. § 122-58.7(f) that:

> Hearings may be held in an appropriate room not used for treatment of patients at the mental health facility in which the respondent is being treated, if it is located within the judge's judicial district, or in the judge's chambers. A hearing shall not be held in a regular courtroom, over objection of the respondent, if in the discretion of a judge, a more suitable place is available.

Therefore, one can say that a non-courtroom atmosphere is generally available as an alternative to completely waiving the presence of the respondent at the hearing. The alternative spoken of in Suzuki has been provided by the statute itself.

We, therefore, conclude that the waiver provision of N.C.G.S. § 122-58.7(d) does not offend due process.

IV. Privilege Against Self-Incrimination

Although the fifth amendment's privilege against self-incrimination by its own terms applies only to "criminal cases," case law clearly establishes that the privilege applies to any

type of proceeding be it criminal, civil, administrative, judicial, investigative, or adjudicatory where a witness may reasonably apprehend that his statements could be used in a criminal proceeding or could lead to other evidence which might be so used. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

The plaintiff contends that the privilege should apply to the involuntary commitment proceedings so that no statements made by a respondent in such a proceeding to a psychiatrist could be used to commit him in the absence of a warning to the individual that they might be so used. The plaintiff heavily emphasizes the liberty interest involved and cites authority which, also emphasizing the liberty interest, apply the privilege to such proceedings.[14]

Although the liberty interest is indeed great, the mere fact that liberty may be at stake does not automatically invoke the privilege. See Middendorf v. Henry, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976); Baxter v. Palmigiano, ___U.S.___, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); United States v. Albright, 388 F.2d 719 (4th Cir. 1968).

We are of the opinion that to apply the privilege to the type of proceedings here challenged would be to destroy the valid purposes which they serve as it would make them unworkable and ineffective. Gomes v. Gaughan, 471 F.2d 794 (1st Cir. 1973); Hawks v. Lazaro, ___W.Va.___, 202 S.E.2d 109 (1974).

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[14] Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded, 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded, 421 U.S. 957, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975), on remand, 413 F. Supp. 1318 (E.D. Wis. 1976).

As was the case in Tippett v. State of Maryland, 436 F.2d 1153 (4th Cir. 1971), aff'g sub nom., Sas v. State of Maryland, 295 F. Supp. 389 (D. Md. 1969), the purpose and effect of these proceedings are not the finding of facts upon which a finding of criminal guilt might be based, but treatment and, therefore, the privilege does not apply.[15] Judge Sobeloff, concurring in part and dissenting in part, in Tippett, 436 F.2d at 1162, made the following persuasive statement when he concluded that the privilege should not apply to proceedings under which prisoners were committed for mental treatment:

> . . . the right against self-incrimination cannot be rigidly applied in Patuxent proceeding. I rest, however, not on the asserted ground that the Act is "civil" but that, because of the unusual nature of the necessary inquiries, the legitimate objectives of the legislation would be frustrated were inmates permitted to refuse cooperation. Granting the inmate the right to silence would in many instances thwart the personal examinations and interviews considered indispensable in determining whether the prisoner is or is not a defective delinquent.

V. Burden of Proof

The plaintiff asserts that the statutory scheme also violates due process because of its failure to provide for proof beyond a reasonable doubt. The statute, N.C.G.S. § 122-58.7(i), provides that: "To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others." Although

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15 Tippett was more recently approved in Dower v. Boslow, 539 F.2d 969 (4th Cir. 1976), aff'g in part and reversing in part, 396 F. Supp. 1070 (D. Md. 1975).

the case law is greatly divided on this issue,[16] we are of the opinion that in light of the precedent in the Fourth Circuit and in light of the nature of the involuntary commitment proceedings, that the legislature's choice of the standard of proof does not offend due process.

It should initially be noted that the resolution of this issue does not turn on whether the proceeding is classified as "civil" or "criminal," In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), but rather on the basis of the competing interests at stake and the risk which society is willing to assume for an erroneous decision to commit or an erroneous decision not to commit.[17]

The Fourth Circuit ruled in Tippett v. State of Maryland, 436 F.2d 1153 (4th Cir. 1971), and again in Dower v. Boslow,

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16 The courts adopting a "clear and convincing" or "clear, unequivocal, and convincing," or "clear, cogent, and convincing" standard of proof are: Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976); Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), prob. juris. noted, ___ U.S. ___, ___ S.Ct. ___, 47 L.Ed.2d 731 (1975); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975); Dixon v. Attorney General of Pennsylvania, 325 F. Supp. 966 (M.D. Pa. 1971); Hawks v. Lazaro, ___ W.Va. ___, 202 S.E.2d 109 (1974). The courts adopting a standard of proof of beyond a reasonable doubt are: United States ex rel. Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975); In re Ballay, 482 F.2d 648 (D.C. Cir. 1973); Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded, 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded, 421 U.S. 957, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975), on remand, 413 F. Supp. 1318 (E.D. Wis. 1976).

17 The mere fact that liberty may be at stake does not exact a standard of proof of beyond a reasonable doubt. The Supreme Court has adopted a clear and convincing standard in revocation of naturalization, Chaunt v. United States, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960), in expatriation cases, Nishikawa v. Dulles, 356 U.S. 129, 78 S.Ct. 612, 2 L.Ed.2d 659 (1958), and in deportation proceedings, Woodby v. Immigration Service, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966).

539 F.2d 969 (4th Cir. 1976), that the Maryland choice of the standard of proof of a preponderance of the evidence in a proceeding to commit prisoners for treatment did not violate due process. The Tippett majority, 436 F.2d at 1158-59, stated:

> We might all be happier had it been stated in terms of clear and convincing proof rather than in terms of a preponderance of the evidence. . . . In any event, in the present state of our knowledge, choice of the standard of proof should be left to the state. A legislative choice of the preponderance standard, the same standard governing civil commitments of mentally ill persons who have no history of criminality, ought not to be held in violation of due process requirements when we have no firm foundation for an evaluation of the practical effects of the choice.

Indeed, the liberty interest in Tippett and Dower may be said not to be as significant as that involved here since in those instances the issue was the commitment for treatment, as opposed to a penal commitment, of persons whose liberty had already been deprived as a result of criminal proceedings. However, the involuntary commitment proceedings do not have as their sole purpose the deprivation of liberty, but also have as a significant and valid goal the treatment and aid of a person alleged to be mentally ill or inebriate and who is imminently dangerous to himself or others. The issues in such a proceeding are by their very nature not susceptible to proof of objective facts. Adoption of a standard of proof of beyond a reasonable doubt would seem to be an impossible burden. As stated by Judge Sobeloff, concurring in part and dissenting in part, in Tippett, 436 F.2d at 1165, in urging the adoption of a clear and convincing standard of proof:

> It must be recognized, however, that as to the ultimate issue of the inmate's dangerousness, the beyond a reasonable doubt standard may in practical operation be too onerous. After all, the ultimate issue is not as in a criminal case whether an alleged act was committed or event occurred, but the much more subjective issue of the individuals' mental and emotional character. Such a subjective judgment cannot ordinarily attain the same "state of certitude" demanded in criminal cases.

We, therefore, join those courts which have held that a standard of proof of beyond a reasonable doubt is not mandated by the due process clause, cases cited at note 15, supra, and hold that the North Carolina legislature's choice of proof by clear, cogent, and convincing evidence does not violate that constitutional prohibition.

VI. Equal Protection--Jury Trial

A respondent in an involuntary commitment proceeding is not afforded a jury trial on the issues of whether he is mentally ill or inebriate and imminently dangerous to himself or others. North Carolina gives a jury trial to persons subjected to lunancy proceedings under N.C.G.S. § 35-2 in which a guardian is appointed to handle the affairs of one found by the jury to be mentally defective, mentally disordered, or incompetent from want of understanding to manage his own affairs. This difference in procedure is the basis for the plaintiff's claim that he has been denied the equal protection of the laws.[18]

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[18] The plaintiff also contends that it is a denial of equal protection for N.C.G.S. § 35-3 to provide that one who is confined in a state hospital may have a guardian appointed upon the certificate of the superintendent of the hospital while one not so confined has a jury trial in order for a guardian to be appointed. The plaintiff argues, therefore, that persons confined in a facility pursuant to Article 5A of Chapter 122 of the General Statutes would also be subjected to the appointment of a guardian upon the mere certificate of the superintendent of such facility whereas those not so committed would have a jury make that determination. Assuming arguendo that such is the case, that contention goes to the constitutionality of N.C.G.S. § 35-3, not Article 5A of Chapter 122 of the North Carolina General Statutes.

The equal protection clause demands that the state treat alike persons who are similarly situated in absence of a sufficient justification for the difference in treatment. The provision is not offended if the state action affects all persons similarly situated in like manner. See, e.g., Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885). As stated by Justice Frankfurter: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Tinger v. Texas, 310 U.S. 141, 147, 60 S.Ct. 879, ____, 84 L.Ed. 1124, 1128 (1940). It is on this point that the plaintiff's argument falters as the state is not treating persons similarly situated differently. It is true that both the class of persons subjected to involuntary commitment proceedings and the class of persons subjected to the appointment of a guardian may have mental problems. However, it is at that point that the similarity ends. The standards and purposes of the proceedings to commit someone who is mentally ill or an inebriate and imminently dangerous to himself or others are entirely different from the standards and purposes of the appointment of a guardian to one who is found incapable of handling his own affairs. They are, therefore, not similarly situated. The authorities cited by the plaintiff, which find a denial of equal protection where the state provides for a jury trial or standards for commitment generally but does not give a jury trial or the same standards for persons to be committed on the basis of a criminal finding of guilt for a particular crime, Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972), or after the termination

of their penal sentence, Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), are not in point. They deal with the problem where the state gives a jury trial to one class of persons to be committed but not to another class of persons to be committed. What we have here is the state giving a jury trial to those persons for whom a guardian is being appointed and not to those persons being involuntarily committed. We perceive no violation of the equal protection clause.

Assuming arguendo that the classification involved did affect persons similarly situated, we are of the opinion that the difference in treatment is totally justified under the rational basis test.[19] A finding that a person is not capable of handling his own affairs so as to require appointment of a guardian seems to us more susceptible to the practical wisdom of a jury than determining whether a person is mentally ill or an inebriate and dangerous to himself or others. The latter finding may not unreasonably have been thought by the legislature to be beyond the competency of a jury.

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[19] The rational basis test applies in light of the fact that there is not a fundamental right to a jury trial in civil commitment proceedings. See, e.g., Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975); Lynch v. Baxley, 386 F. Supp. 378 (M.D.Ala. 1974). The mere fact that liberty is at stake does not invoke the right to a jury trial. See, e.g., Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970); Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The Supreme Court has analyzed an equal protection claim in the context of a state granting a jury trial for persons subjected to civil commitment generally but not for the mental commitment of persons charged with crimes or in prisons, in terms of a rational basis test. See Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); Baxstrom v. Harold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966).

Predicting human behavior is certainly no task for the psychologically uninformed, and it is easier for a psychiatrist to inform one judge than 12 jurors. Also of great concern is the fact that the proceedings for involuntary commitment are informal in their nature and are closed to the public. N.C.G.S. § 122-58.7(g). This privacy and informality, which are obviously legislated for the purpose of protecting one subjected to the proceedings from suffering additional trauma, would be totally lost if a jury were present. Indeed the persons subjected to such a proceeding may not be capable of dealing with a full-blown adversary process. We find these purposes and justifications not only sufficient to pass constitutional muster, but laudible, and conclude that the failure to provide a jury trial in involuntary commitment proceedings does not violate the equal protection clause.

VII. Conclusion

For the above-stated reasons, this Court finds that Article 5A of Chapter 122 of the North Carolina General Statutes is constitutional. In accordance with the foregoing it is ORDERED that: (1) the motion of the defendant for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, be, and the same hereby is, GRANTED; (2) the motion of the plaintiff for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, be, and the same hereby is, DENIED; and (3) the motion of the plaintiff to certify this action as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure, be, and the same hereby is, DENIED.

A judgment shall be entered accordingly.

A True Copy
Teste:
Carmon J. Stuart, Clerk
By: Gabbie D. Frazier
Deputy Clerk

D47

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

FILED
MAR 31 1977
IN THIS OFFICE
Clerk, U. S. District Court
Greensboro, N.C.

ROY KIRK FRENCH, III, on behalf of himself and all other persons similarly situated, Plaintiff	:	C-76-52-WS
v.	:	
THE HONORABLE A. EUGENE BLACKBURN, Clerk of Court of the Twenty-First Judicial District of the State of North Carolina, as representative of a class of defendants similarly situated, Defendants	:	JUDGMENT OF THREE-JUDGE COURT

The above-entitled cause came regularly on for consideration by the Court on the motions of the plaintiff and the defendant for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. Also before the Court was the motion of the plaintiff to certify this action as a class action pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure.

The motions were duly submitted for consideration and decision, and the Court, after due consideration of the pleadings, stipulations, briefs, and arguments of counsel, on this date rendered its decision in an Opinion wherein it was found that the motion of the defendant for summary judgment should be allowed and that the motions of the plaintiff should be denied.

Now, therefore, pursuant to the Opinion filed

contemporaneously herewith, it is ORDERED that the defendant's motion for summary judgment be, and the same hereby is, allowed and that this action is dismissed. It is further ORDERED that the motions of the plaintiff for summary judgment and for certification of the action as a class action be, and the same hereby are, denied.

FOR THE COURT:

United States District Judge

March 31, 1977

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WINSTON-SALEM DIVISION

ROY KIRK FRENCH, III, on behalf of himself and all other persons similarly situated,

Plaintiff,

vs.

THE HONORABLE A. EUGENE BLACKBURN, Clerk of Court of the Twenty-First Judicial District of the State of North Carolina, as representative of a class of defendants similarly situated,

Defendant.

CIVIL ACTION NO. C-76-52-WS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Roy Kirk French, III, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Three-Judge Court for the Middle District of North Carolina granting summary judgment for the defendant and dismissing the complaint herein, said judgment having been entered in this action on March 31, 1977.

This appeal is taken pursuant to 28 U.S.C. §1253.

Dated: April 5, 1977.

BERTRAM ERVIN BROWN, II
The Legal Aid Society of Forsyth County
202 West Third Street
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BARRY GAKELL
1310 Le Clair Street
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Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Bertram Ervin Brown, II, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served a copy of the foregoing Notice of Appeal by depositing a copy of the same in the United States mail, postage prepaid, and addressed to:

Isaac T. Avery, III, Esq.
Associate Attorney
N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27682

This the 5th day of April, 1977.

BERTRAM ERVIN BROWN, II
Attorney for Appellant

ARTICLE 5A.

Involuntary Commitment.

§ 122-58.1. Declaration of policy. — It is the policy of the State that no person shall be committed to a mental health facility unless he is mentally ill or an inebriate and imminently dangerous to himself or others; that a commitment will be accomplished under conditions that protect the dignity and constitutional rights of the person; and that committed persons will be discharged as soon as a less restrictive mode of treatment is appropriate. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.2. Definitions. — As used in this Article:

(1) The phrase "dangerous to himself" includes, but is not limited to, those mentally ill or inebriate persons who are unable to provide for their basic needs for food, clothing, or shelter;

(2) The words "inebriety" and "mental illness" have the same meaning as they are given in G.S. 122-36; and

(3) "Law-enforcement officer" means sheriff, deputy sheriff, police officer, and State highway patrolman. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.3. Affidavit and petition before clerk or magistrate; custody order. — (a) Any person who has knowledge of a mentally ill or inebriate person who is imminently dangerous to himself or others may appear before a clerk or assistant or deputy clerk of superior court or a magistrate of district court and execute an affidavit to this effect, and petition the clerk or magistrate for issuance of an order to take the respondent into custody for examination by a qualified physician. The affidavit shall include the facts on which the affiant's opinion is based. The respondent must be found in or be a resident of the same county as the clerk or magistrate.

(b) If the clerk or magistrate finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill or inebriate and imminently dangerous to himself or others, he shall issue an order to a law-enforcement officer to take the respondent into custody for examination by a qualified physician.

(c) If the clerk or magistrate issues a custody order, he shall also make inquiry, as soon as may be and in any manner deemed reliable, as to whether the respondent is indigent within the meaning of G.S. 7A-450. A magistrate shall report the result of this inquiry to the clerk.

(d) An affiant who is a qualified physician may execute the oath to the affidavit before any official authorized to administer oaths. He is not required to appear before the clerk or magistrate for this purpose. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.4. Duties of law-enforcement officer; examination by qualified physician. — (a) Upon receipt of the custody order of the clerk or magistrate, a law-enforcement officer, within 24 hours after the order is signed, shall take the respondent into custody. Immediately upon assuming custody, and in any event within 48 hours, the officer shall take the respondent to a community mental health center for an examination by a qualified physician; if a qualified physician is not available in the community mental health center, he shall take the respondent to any qualified physician locally available. If a physician is not immediately available, the officer may temporarily detain the respondent in a community mental health facility, if one is available; if such a facility is not available, he may cause the detention of the respondent, under appropriate supervision, in the respondent's home, in a private hospital or a clinic, in a general hospital, or in a regional mental health facility, but not in a jail or other penal facility.

(b) If the affiant who obtained the custody order is a qualified physician, the examination set forth in subsection (a) is not required. In this case, the law-enforcement officer shall take the respondent directly to a mental health facility described in subsection (c).

(c) The qualified physician shall examine the respondent as soon as possible, and in any event within 24 hours, after the respondent is presented for examination. If the physician finds that the respondent is not mentally ill or an inebriate, or is not imminently dangerous to himself or others, the law-enforcement officer shall release him, and the proceedings shall be terminated. If the physician finds that the respondent is mentally ill or an inebriate, and is imminently dangerous to himself or others, the law-enforcement officer shall take the respondent to a community mental health facility or public or private facility designated or licensed by the Division of Mental Health Services of the Department of Human Resources for temporary custody, observation, and treatment of mentally ill or inebriate persons pending a district court hearing. If there is no community mental health facility so designated, and if the respondent is indigent and unable to pay for his care at a private facility, the law-enforcement officer shall take the respondent to a regional psychiatric facility designated by the Division of Mental Health Services for custody and treatment of the mentally ill and inebriate, and immediately notify the clerk of superior court of his actions.

(d) The findings of the qualified physician and the facts on which they are based, shall be in writing, in all cases. A copy of the findings shall be transmitted to the clerk of superior court by the most reliable and expeditious means. If it cannot be reasonably anticipated that the clerk will receive the copy within 48 hours of the time that it was signed, the physician shall also communicate his findings to the clerk by telephone. (1973, c. 726, s. 1; c. 1408, s. 1.)

APPENDIX "D"

§ 122-58.5. Duties of clerk of superior court. — Upon receipt of a qualified physician's finding that a respondent is mentally ill or an inebriate, and imminently dangerous to himself or others, the clerk of superior court shall, upon direction of a district court judge, assign counsel, if necessary, calendar the matter for hearing, and notify the respondent and counsel of the time and place of the hearing. Notice must be given at least 48 hours in advance, unless waived by counsel for the respondent. (1973, c. 1408, s. 1.)

§ 122-58.6. Treatment and release pending hearing. — (a) Within 24 hours of arrival at a community or regional mental health facility described in G.S. 122-58.4(c), the respondent shall be examined by a qualified physician. If the qualified physician finds that the respondent is mentally ill or an inebriate, and is imminently dangerous to himself or others, he shall hold the respondent at the facility pending the district court hearing. If the qualified physician finds that the respondent is not mentally ill or inebriate, or is not imminently dangerous to himself or others, he shall release the respondent pending the district court hearing and so notify the clerk of superior court of the county from which the respondent was sent. Unless the respondent provides his own transportation, the law-enforcement officer shall return the respondent to the originating county. If a respondent, so released, fails, upon proper notification, to attend the hearing, and his presence is not waived by his counsel and the court, he may be taken into custody and returned to the releasing facility by any law-enforcement officer on order of the judge. Days the respondent is on release shall not be counted in computing the 10-day period in which the hearing must be held.

(b) The findings of the qualified physician and the facts on which they are based shall be in writing, in all cases. A copy of the findings shall be transmitted to the clerk of superior court by reliable and expeditious means.

(c) Pending the district court hearing, the qualified physician attending the respondent is authorized to administer to the respondent reasonable and appropriate medication and treatment that is consistent with accepted medical standards. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.7. District court hearing. — (a) A hearing shall be held in district court within 10 days of the day the respondent is taken into custody. Upon motion of the respondent's counsel, sufficiently in advance to avoid movement of the respondent, continuances of not more than five days each may be granted.

(b) The district attorney may represent the petitioner in cases of significant public interest.

(c) If the respondent is allegedly mentally ill, he shall be represented by counsel of his choice, or, if he is indigent within the meaning of G.S. 7A-450, or refuses to retain counsel if financially able to do so, by counsel appointed by the court. If the respondent is an alleged inebriate, he may be represented by counsel of his choice, or he may waive counsel, if the judge finds that he is sober and capable of making an informed decision, and that the waiver is voluntary. If the alleged inebriate does not waive counsel and is an indigent within the meaning of G.S. 7A-450, the court shall appoint counsel to represent him.

(d) With the consent of the court, counsel may in writing waive the presence of the respondent.

(e) Certified copies of reports and findings of qualified physicians and medical records of the mental health facility are admissible in evidence, but the respondent's right to confront and cross-examine witnesses shall not be denied.

(f) Hearings may be held in an appropriate room not used for treatment of patients at the mental health facility in which the respondent is being treated, if it is located within the judge's judicial district, or in the judge's chambers. A hearing shall not be held in a regular courtroom, over objection of the respondent, if in the discretion of a judge, a more suitable place is available.

(g) The hearing shall be closed to the public, unless the respondent requests otherwise.

(h) A copy of all documents admitted and, where applicable, a transcript of oral testimony considered shall be furnished by the clerk to the respondent on request. If the respondent is indigent, the transcript shall be provided at State expense.

(i) To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others. The court shall record the facts which support its findings. (1973, c. 726, s. 1; c. 1408, s. 1; 1975, cc. 322, 459.)

§ 122-58.8. Disposition. — (a) If the court finds that the respondent is not mentally ill or inebriate, or is not imminently dangerous to himself or others, he shall be discharged, and the facility in which he was last a patient so notified.

(b) If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill or inebriate, and is imminently dangerous to himself or others, it may order treatment, inpatient or outpatient, for a period not in excess of 90 days, at a mental health facility, public or private, designated or licensed by the Division of Mental Health Services. Treatment at a private facility shall be at the expense of the respondent to the extent that such charges are not disposed of by contract between the county and the private facility.

(c) If the court orders outpatient treatment, and the respondent fails to adhere to the prescribed outpatient treatment program, on report of the failure by the chief of medical services of the treatment facility, the court, upon notice to the respondent and his counsel, may order a supplemental hearing, and further order inpatient treatment in a designated or licensed facility for a period of not more than 90 days running from the date of the order. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.9. Appeal. — The judgment of the district court is final. Appeal may be had to the Court of Appeals, on the record, as in civil cases. Appeal does not stay commitment, unless so ordered by the Court of Appeals. The Attorney General shall represent the petitioner on appeal. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.10. Duty of assigned counsel; discharge. — Counsel assigned to represent an indigent respondent at the initial district court hearing is also responsible for perfecting and concluding an appeal, if there is one. Upon completion of an appeal, if any, or upon transfer of the respondent to a regional mental health facility, if there is no appeal, assigned counsel is discharged. If the respondent is committed to a community mental health facility, assigned counsel remains responsible for his representation until discharged by order of district court, or until the respondent is unconditionally discharged from the community facility. (1973, c. 1408, s. 1.)

§ 122-58.11. Rehearings. — (a) Fifteen days before the end of the initial treatment period, if the chief of medical services of the inpatient facility determines that treatment of a respondent beyond the initial period will be necessary, he shall so notify the clerk of superior court of the county in which the facility is located. The clerk, at least 10 days before the end of the initial period, on order of a district court judge of the judicial district in which the facility is located, shall calendar the rehearing, shall notify the respondent and his counsel of the time and place of the rehearing.

(b) Rehearings shall be held at the facility in which the respondent is receiving treatment. The judge shall be a judge of the district court of the judicial district in which the facility is located, or a district court judge temporarily assigned to that district.

(c) Rehearings are governed by the same procedures as initial hearings, and the respondent has the same rights he had at the initial hearing, including the right to appeal.

(d) If the court finds that the respondent is not in need of continued hospitalization, or of outpatient care, it shall unconditionally discharge him. A copy of the discharge order shall be furnished by the clerk of superior court of the county of original commitment and the facility from which the respondent is being discharged. If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others, and in need of continued hospitalization, or, in the alternative, of outpatient care, it may order hospitalization (or outpatient care, as the case may be) for an additional period not in excess of 180 days.

(e) Fifteen days before the end of the second commitment period, and annually thereafter, the chief of medical services of the facility shall review and evaluate the condition of each respondent, and if he determines that a respondent is in continued need of hospitalization or, in the alternative, of outpatient treatment, shall so notify the respondent, his counsel, and the clerk of superior court of the county in which the facility is located. Unless the respondent through his counsel files with the clerk a written waiver of his right to a rehearing, the clerk, on order of a district court judge of the district in which the facility is located, shall calendar a rehearing for not later than the end of the current commitment period. The procedures and standards for the rehearing are the same as for the first rehearing. Any recommitment ordered shall be for only such period of time as continued treatment is deemed necessary by the chief of medical services of the treatment facility, but in no event longer than one year.

(f) There are no rehearings for outpatients. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.12. Counsel for indigents at rehearings. — (a) The senior regular resident superior court judge of a judicial district in which a regional psychiatric facility for the care and treatment of the mentally ill and inebriate is located shall appoint an attorney licensed to practice in North Carolina as special counsel for the mentally ill and inebriate who are indigent. Such special counsel shall serve at the pleasure of the appointing judge, shall not privately practice law, and shall receive annual compensation within the salary range for assistant district attorneys, as fixed by the Administrative Officer of the Courts. It shall be the duty of the special counsel to represent at rehearings under this Article all indigent respondents committed to the facility by a district court judge for mental illness or inebriety, and to represent all indigent respondents who, after a rehearing, appeal to the Court of Appeals. The initial determination of indigency shall be made by the special counsel in accordance with G.S. 7A-450(a), but is subject to redetermination by the presiding judge.

(b) The regional facility shall provide suitable office space for the counsel to meet privately with respondents. The Administrative Office of the Courts shall provide secretarial and clerical service, and necessary equipment and supplies for his office.

(c) In the event of a vacancy in the office of special counsel, or his incapacity, or a conflict of interest, counsel for indigents at rehearings may be assigned by a district judge of the district from among those members of the bar who maintain law offices within 20 miles of the regional facility. Counsel may also be so assigned when, in the opinion of the Administrative Officer of the Courts, the volume of cases warrants. (1973, c. 47, s. 2; c. 1408, s. 1.)

§ 122-58.13. Release and conditional release. — The chief of medical services of a public or private mental health facility shall discharge a committed respondent unconditionally at any time he determines that the patient is no longer in need of hospitalization. He may also release a respondent conditionally, for periods not in excess of 30 days, on specified medically appropriate conditions. Violation of the conditions is grounds for return to the releasing facility. A law-enforcement officer, on written request of the chief of medical services of the facility, shall take a conditional releasee into custody and return him to the facility. Notice of discharge and of conditional release shall be furnished the clerk of superior court of the county of commitment, and the county in which the facility is located. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-58.14. Transportation. — (a) Transportation of a respondent to or from a clerk or magistrate, a qualified physician, a community mental health facility, and a hearing shall be provided by the city or county, which said transportation may be by city- or county-owned vehicles, or by private ambulance by contract with the city or county. If the respondent is a resident of a city, the city has the duty to provide the transportation; if the respondent is a resident of a county, outside of city limits, the county has the duty to provide transportation; if a respondent resides outside of the county, the city (or county, as the case may be) in which he is taken into custody has the duty to provide transportation; but cities and counties may contract with each other to accomplish this function. Transportation to or from a regional hospital outside the county, for any purpose, is the responsibility of the county, pursuant to G.S. 122-42. If the respondent is not indigent, the city or county is entitled to recover the costs of transportation from the respondent. A respondent being discharged from a facility may elect to use his own transportation.

(b) To the extent feasible, law-enforcement officers transporting respondents shall dress in plain clothes, and shall travel in unmarked vehicles. (1973, c. 1408, s. 1.)

§ 122-58.15. Commitment of eligible veterans to Veterans Administration facility. — References in this Article to community or regional mental health facilities shall be deemed to include any facility operated by the Veterans Administration for inpatient care and treatment of mentally ill or inebriate veterans. Such a facility may be used for temporary detention pending a district court hearing, and for commitment subsequent to such a hearing. Eligibility of the veteran-respondent for treatment at a Veterans Administration facility, and the availability of space therein, shall be determined in all cases prior to sending or committing a veteran-respondent thereto by filing with the court a certificate of eligibility from the Veterans Administration.

Rehearings for veteran-respondents committed to a Veterans Administration facility shall be held at the facility or at the county courthouse in the county in which the facility is located, and counsel for rehearings shall be assigned from among the members of the bar of the same county. (1973, c. 1408, s. 1.)

§ 122-58.16. Use of community and area mental health facilities. — Directors of community mental health facilities and area mental health programs shall submit for approval by the Division of Mental Health Services, plans consistent with this Article, for maximum utilization of community and area mental health facilities. Such plans shall be formulated after consultation with local court officials and the local medical society. (1973, c. 1408, s. 1.)

§ 122-58.17. Respondents committed under prior law. — Respondents committed to a mental health facility for a specific period of time prior to the effective date of this Article shall be deemed to have been committed, for the same period of time, under this Article. Respondents committed for an indefinite period of time shall be processed under this Article, with the initial district court hearing conducted within 30 days after the effective date of this Article. (1973, c. 1408, s. 1.)

§ 122-58.18. Special emergency procedure for violent persons. — When a person subject to commitment under the provisions of this Article is also violent and requires restraint, and delay in taking him to a qualified physician for examination would likely endanger life or property, a law-enforcement officer may take the person into custody and take him immediately before a magistrate or clerk. The law-enforcement officer shall execute the affidavit required by G.S. 122-58.3, and in addition shall swear that the respondent is violent and requires restraint, and that delay in taking the respondent to a qualified physician for an examination would endanger life or property.

If the clerk or magistrate finds by clear, cogent, and convincing evidence that the facts stated in the affidavit are true, and that the respondent is in fact violent and requires restraint, and that delay in taking the respondent to a qualified physician for an examination would endanger life or property, he shall order the law-enforcement officer to take the respondent directly to a community or regional mental health facility designated for the custody and treatment of such persons under this Article.

Respondents received at a community or regional mental health facility under the provisions of this section shall be examined and processed thereafter in the same manner as all other respondents under this Article. (1973, c. 726, s. 1; c. 1408, s. 1.)

§ 122-59: Repealed by Session Laws 1973, c. 726, s. 2.

Plaintiff's Exhibit E

STATE OF NORTH CAROLINA
County of Forsyth

F # 76SP18
Film #

In The Matter of
Roy Kirk French III

In The General Court of Justice
District Court Division

Name and Address of Respondent

NOTICE OF HEARING
FOR INVOLUNTARY COMMITMENT

To the respondent named above --- GREETING:

TAKE NOTICE that it has been alleged that you are a proper subject for involuntary commitment to a treatment facility pursuant to the laws of the State of North Carolina. You are hereby notified to appear at a hearing before a judge of the district court to be held at 2:00 o'clock, P.m., on the 28 day of January, 1976, at the Hall of Justice County Courthouse. You have a right to be represented by an attorney at the hearing and should employ an attorney if you have not already done so. If you are indigent and cannot afford to pay an attorney, you should contact the clerk of superior court of the county named above. The clerk will advise the district court judge who will appoint an attorney to represent you.

At the hearing, evidence will be presented as to your condition and you will be allowed to present evidence. Upon the basis of the evidence presented, the judge will decide whether you should be released, whether you should be committed to a treatment facility for a period not to exceed 90 days or whether you should undergo outpatient treatment at a State or private facility.

Issued at 11:45 o'clock A.m., this 19 day of January, 1976.

John C. Davis
Assistant/Clerk of Superior Court

This Notice shall also be served upon the attorney indicated below:

Attorney

Address

APPENDIX "E"

G.S. 122-65(1)
AOC-L Form 402
9/73

(OVER)

PLAINTIFF'S EXHIBIT K

STATE OF NORTH CAROLINA
County of Forsyth

File #
Film #

In The General Court of Justice
District Court Division

In The Matter of

Roy Kirk French III
Route #2, Fairfire Rd
Kernersville N.C.
Name and Address of Respondent

NOTICE OF HEARING
FOR INVOLUNTARY COMMITMENT

To the respondent named above --- GREETING:

TAKE NOTICE that it has been alleged that you are a proper subject for involuntary commitment to a treatment facility pursuant to the laws of the State of North Carolina. You are hereby notified to appear at a hearing before a judge of the district court to be held at 2:00 o'clock, P.m., on the 9th day of February, 1977, at the Hall of Justice - Forsyth County Courthouse. You have a right to be represented by an attorney at the hearing and should employ an attorney if you have not already done so. If you are indigent and cannot afford to pay an attorney, you should contact the clerk of superior court of the county named above. The clerk will advise the district court judge who will appoint an attorney to represent you.

At the hearing, evidence will be presented as to your condition and you will be allowed to present evidence. Upon the basis of the evidence presented, the judge will decide whether you should be released, whether you should be committed to a treatment facility for a period not to exceed 90 days or whether you should undergo outpatient treatment at a State or private facility.

Issued at 7:00 o'clock P.m., this 31st day of January, 1977.

Assistant/Clerk of Superior Court

This Notice shall also be served upon the attorney indicated below:

Attorney

Address

G.S. 122-65(1)
AOC-L Form 402
9/73

(OVER)

ARTICLE 2.

Guardianship and Management of Estates of Incompetents.

§ 35-2. Inquisition of lunacy; appointment of guardian. — Any person, in behalf of one who is deemed a mental defective, inebriate, or mentally disordered, or incompetent from want of understanding to manage his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the superior court of the county where such supposed mental defective, inebriate or mentally disordered person resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed mental defective, inebriate or mentally disordered person, to the sheriff of the county, commanding him to summon a jury of 12 men to inquire into the state of such supposed mental defective, inebriate or mentally disordered person. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be a mental defective, inebriate, mentally disordered, or incompetent person by inquisition of a jury, as in cases of orphans.

Either the applicant or the supposed mental defective, inebriate, mentally disordered, or incompetent person may appeal from the finding of said jury to the next session of the superior court, when the matters at issue shall be regularly tried de novo before a jury, and pending such appeal, the clerk of the superior court shall not appoint a guardian for the said supposed mental defective, inebriate, mentally disordered, or incompetent person, but the resident judge of the district, or the judge presiding in the district, may in his discretion appoint a temporary receiver for the alleged incompetent pending the appeal. The trial of said appeal in the superior court shall have precedence over all other causes.

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be a mental defective, inebriate, mentally disordered or incompetent person by inquisition of a jury as in cases of orphans. If the person so adjudged incompetent shall be an inebriate within the definition of G.S. 35-1, the clerk shall proceed to commit said inebriate to the department for inebriates at the State Hospital at Raleigh for treatment and cure. He shall forward to the superintendent of said State Hospital a copy of the record required herein to be made, together with the commitment, and these shall constitute the authority to said superintendent to receive and care for such said inebriate. The expenses of the care and cure of said inebriate shall constitute a charge against the estate in the care of his guardian. If, however, such estate is not large enough to pay such expenses the same shall be a valid charge against the county from which said inebriate is sent. Provided, where the person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the clerk may appoint a trustee instead of guardian for said person. The trustee or guardian appointed shall be vested with all the powers of a guardian administering an estate for any person and shall be subject to all the laws governing the administration of estates of minors and incompetents. The clerks of the superior courts who have heretofore appointed guardians for persons described in this proviso are hereby authorized and empowered to change said appointment from guardian to trustee. The sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. And the juries of the several counties upon whom a process is served under the provisions of this section shall serve and make their returns without demanding their fees in advance. (C. C. P., s. 473; Code, s. 1670; Rev., s. 1890; 1919, c. 54; C. S., s. 2285; 1921, c. 156, s. 1; 1929, c. 203, s. 1; 1933, c. 192; 1945, c. 952, s. 3; 1951, c. 777; 1971, c. 528, s. 31.)

APPENDIX "F"

CERTIFICATE OF SERVICE

I, Bertram Ervin Brown, II, attorney for Roy Kirk French, III, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of May, 1977, I served a copy of the foregoing Jurisdictional Statement and Appendix on the appellee thereto by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to:

Isaac T. Avery, III, Esq.
Associate Attorney
N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27682

This the 20th day of May, 1977.

Bertram Ervin Brown II

BERTRAM ERVIN BROWN, II
Attorney for Appellant